No. WD62028

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI HEALTH CARE ASSOCIATION, et al.

Plaintiffs/Appellants,

v.

BOB HOLDEN, et al.

Defendants/Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

Honorable Thomas J. Brown, III

BRIEF OF PLAINTIFFS/APPELLANTS MISSOURI HEALTH CARE ASSOCIATION, et al.

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JURISDICTIONAL STATEMENT

On May 10, 2002, the Governor withheld money appropriated by §11.445 of House Bill 11 (2001), invoking article IV, § 27 of the Missouri Constitution as support. *L.F. at 123*. Appellants Missouri Health Care Association and three nursing facilities challenged this withholding and refusal to disburse appropriated money, arguing that § 27 was not triggered. *L.F. at 55-75*. The central issue in this case is the interpretation of article IV, § 27 of the Missouri Constitution. The case does not involve (1) the validity of a United States treaty or statute, (2) the validity of a Missouri statute or constitutional provision, (3) the construction of a Missouri revenue law, (4) title to a state office, or (5) the death penalty. *See* Mo. Const. art. V, § 3. Therefore, the case is not within the exclusive appellate jurisdiction of the Missouri Supreme Court. *Id*. Rather, it is within the general appellate jurisdiction of the Court of Appeals. *Id.*

This appeal is from a judgment of the Cole County Circuit Court. Therefore, jurisdiction is in the Western District of the Court of Appeals. *See* §§ 477.050-070, RSMo 2000.

STATEMENT OF FACTS

A. Introduction

On May 10, 2002, the Governor "withheld" $20,795,140 appropriated by § 11.445 of House Bill 11 (2001) for "one-time payments to nursing homes to improve quality and efficiency" of health care for their residents. *L.F. at 123*. When the Governor "withholds" appropriated money, the entity to which the money was appropriated cannot expend the money, even though the General Assembly has authorized the expenditure. *L.F. at 95*. Because Missouri's Medicaid program is underfunded, the payments that the Governor withheld are critical to nursing homes. *L.F. at 124-28*. The withholding jeopardizes their ability to provide quality health care and nursing services to Missouri's frailest citizens. *L.F. at 124-28*. As the Department of Social Services (DOSS) explained in requesting the appropriation for these payments, "[n]ursing facilities are continuing to incur higher costs of providing care to nursing home residents. Additional funding is needed to enable facilities to continue to provide quality care to nursing home residents." *L.F. at 105*.

B. Intergovernmental Transfer Program

The Intergovernmental Transfer Program (IGT) is a Medicaid program. *L.F. at 117-18*. Medicaid – established by Title XIX of the Social Security Act – is a joint state and federal program, in which the federal and state governments share the cost of providing health care for needy citizens. *L.F. at 117*; *see also* § 208.151, RSMo 2000. The primary mechanism to compensate nursing homes for care to Medicaid residents is based on a daily reimbursement rate established by the State. *See* 13 CSR 70-10.015.

The State pays approximately 39% of Medicaid expenses; the federal government pays the remaining 61%. *L.F. at 117*. DOSS calculated that this rate fell short of actual costs to nursing homes by $13.43 per patient per day. *L.F. at 124*. The IGT program supplements this reimbursement through the payments provided for by § 11.445. *L.F. at 111*. These payments are called "second enhanced payments." *L.F. at 120*.

To establish the IGT program at issue in this case, the State had to obtain federal approval by amending its State Medicaid Plan (the contract between Missouri and the federal government). *L.F. at 117*; *see also* 42 U.S.C.S. §§ 1396-1396c (2001). Missouri's IGT program is described in State Plan Amendment 00-08 (SPA 00-08), which was deemed approved by the federal government. *L.F. at 117-18*. In the transmittal to the federal Health Care Financing Administration (now the Centers for Medicare and Medicaid Services), the State described its proposed amendment: "Enhancement Pools are created to increase reimbursement to Government Owned Nursing Facilities and All nursing facilities." *Tr. at Exh F 77*. After SPA 00-08 was approved, DOSS promulgated 13 CSR 70-10.150, essentially adopting SPA 00-08 as state law. *L.F. at 118*.

Pursuant to Missouri's IGT Program, DOSS makes a payment – called a "first enhanced payment" – to seven nursing homes operated by local government entities (four counties, two hospital districts, and one city). DOSS also makes a separate payment – called a "second enhanced payment" – to all nursing homes. *L.F. at 118, 120*. The first enhanced payment is nominally for approved Medicaid services, and consists of state money matched with federal money and paid to the seven local government operated

nursing facilities.[1] *L.F. at 118-19*; *Tr. at Exh F 56*. Next, the local government operated nursing facility transfers the same amount of money to the local government entity that operates it. *L.F. at 119*. The local government entity then transfers (by intergovernmental transfer) the same amount back to DOSS, allowing the State to recoup its initial payment **plus** the federal match. *L.F. at 119-20*. Effectively, this portion of the IGT program "profits" the State an amount equal to the federal match.[2] *L.F. at 119*.

DOSS deposits the revenue generated by the IGT program into a separate Fund in the State Treasury – the Intergovernmental Transfer Fund (IGT Fund). *L.F. at 119*. Money in the IGT Fund is segregated from all other money in the State Treasury. *L.F. at 94-95*. As the second step in the IGT program, money in the IGT fund is disbursed to all nursing homes as the state share of second enhanced payments. *L.F. at 120*. The second enhanced payments also include an additional federal match. *L.F. at 120*. As a practical matter, the second enhanced payments cost the state nothing, consisting entirely of money that comes from the federal government either directly [the federal share] or

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[1] The local government operated nursing facilities are often called "non-state government" nursing facilities, because they are operated by government entities other than the State.

[2] For a description of how this program works under the federal regulations, see generally *Ashley County Med. Ctr. v. Thompson*, 205 F. Supp. 2d 1026, 1032-34 (E.D. Ark. 2002).

indirectly [the money in the IGT Fund]. *L.F. at 119-20.* This case involves $20,795,140 of second enhanced payments, withheld by the Governor. *L.F. at 123.*

C. The Appropriations To Nursing Homes to Increase Quality and Efficiency

The General Assembly must authorize payments from the State Treasury. *L.F. at 95*; *see also* Mo. Const. art. III, § 36; Mo. Const. art. IV, § 28. In addition, after the General Assembly has appropriated money, the Governor must "allot" appropriation authority to the entity to which the money was appropriated. *L.F. at 95*; *see also* Mo. Const. art. IV, § 27

For State Fiscal Year (SFY) 2002, the General Assembly financed the State's IGT program by passing appropriations for the first and second enhanced payments. *L.F. at 119, 120-21*. Section 11.520 of House Bill 11 appropriated the money used to make first enhanced payments. *L.F. at 119*. Section 11.445 of House Bill 11 appropriated state money from the IGT Fund and federal matching money from the Federal Fund (also known as the Title XIX Fund) for second enhanced payments and for other purposes not at issue in this case. *L.F. at 120-21*. It reads:

> Section 11.445. To the Department of Social Services
>
> For the Division of Medical Services
>
> For the purpose of funding **one-time payments to nursing homes to increase quality and efficiency**, to provide one-time funding of $2,800,000 for high Medicaid volume facilities, and to provide one-time funding of up to $1,900,000 for facilities reimbursed less

than $85 per bed day.

Additionally, up to $200,000 provided within this section may be used for a comprehensive evaluation of turnover and care within the nursing home industry.

From Federal Fund ..... $ 81,196,500

From Intergovernmental Transfer Funds 51,803,500

Total (0 F.T.E.) $133,000,000

L.F. at 120-21 (emphasis added); *Tr. at Exh F 438*; *2001 Mo. Laws 167.* "Federal Fund" refers to the Title XIX Fund. *L.F. at 120-21*. The Governor did not veto or line-item veto any portion of the appropriations in § 11.445. *L.F. at 121*.

D. The Appropriations Were Made from Specific Funds

As its text demonstrates, § 11.445 authorized DOSS to make second enhanced payments from specific Funds. *L.F. at 121*. A "Fund" is a separate accounting unit in the State Treasury. *L.F. at 94-95*. Revenues to and expenditures from a Fund are accounted for separately from money in all other Funds. *L.F. at 94-95*. Funds are created by the constitution, statute, or administrative action. *L.F. at 95, 112*. Each Fund in the Treasury is assigned a unique identifying number. *L.F. at 95, 112*. The Intergovernmental Transfer Fund is Fund 139; the Title XIX Fund is Fund 163. *L.F. at 95*. Funds are used to segregate money in the State Treasury. *L.F. at 94*. The State Accounting System – known by the acronym "SAM II" – is organized around the Funds.

L.F. at 94. According to the SAM II manual, "all fiscal activities related to the state must be accounted for within a Fund." *L.F. at 94*.[3]

Section 33.543 creates a statutory General Revenue Fund. *L.F. at 95*; *see also* § 33.543, RSMo 2000. Within the statutory General Revenue Fund, administrative Funds – accounts – are established by the General Assembly to further segregate revenues. *L.F. at 95, 112*; *see also* § 33.571.2, RSMo 2000. The IGT Fund (Fund 139) is an administrative Fund within the statutory General Revenue Fund. *L.F. at 95, 112*. There is also an administrative Fund called the "General Revenue Fund" within the statutory General Revenue Fund. *See L.F. at 95*. The administrative General Revenue Fund is Fund 101. *L.F. at 95*. The administrative Funds are separate and distinct from each other. *L.F. at 95*. For example, if the IGT Fund (Fund 139) has $10 and the administrative General Revenue Fund (Fund 101) has $100, the $10 in Fund 139 is not part of the $100 in Fund 101. *L.F. at 95*.

Thus, when § 11.445 of House Bill 11 appropriated money from the IGT Fund (Fund 139) and the Title XIX Fund (Fund 163), it authorized DOSS to expend revenues segregated in those Funds. *L.F. at 95, 98, 121*. These appropriations were meant to finance "second enhanced payments," which SPA 00-08 and 13 CSR 70-10.150 require ("shall be distributed"). *L.F. at 98, 121*; *Tr. at Exh F 86, 411*.

[3] For further discussion of Funds, see Part I.A. below.

E. The Withholdings

For SFY 2002, actual revenues for certain Funds in the Treasury were less than expected. *L.F. at 122-23.* Early in SFY 2002, the Governor began reducing expenditures below appropriations (withholding appropriated moneys). *L.F. at 122*. As of April 25, 2002, he had already withheld $536,000,000 in appropriated money. *L.F. at 122*. Around this time, the Governor and his staff predicted that revenue to the General Revenue Fund (Fund 101) would still be less than revised estimates. *L.F. at 122*. The Governor decided additional measures were necessary. *L.F. at 122*.

The Governor first recommended using money in the State's "Rainy Day Fund" to offset the additional projected shortfall in General Revenue for SFY 2002. *L.F. at 122*. However, the necessary supermajority of the Missouri House of Representatives refused to approve using the Rainy Day Fund Money. *L.F. at 122.* That proposal having failed, the Governor decided to implement additional withholdings. *L.F. at 122-23*.

On May 10, 2002, the Governor ordered $230,000,000 withheld, including the remaining $20,795,140 in second enhanced payments that are at issue in this case. *L.F. at 122, 123*. When the Governor withheld the remaining second enhanced payments, he reduced DOSS's allotment to expend the remaining $20,795,140 appropriated by § 11.445. *L.F. at 95, 123.* Because he reduced the allotments, DOSS could not expend the money appropriated from the IGT Fund (Fund 139) and the Title XIX Fund (Fund 163) for the second enhanced payments. *L.F. at 95, 102, 123, 124.*

As the trial court specifically found, the May 10 withholdings from these Funds were implemented in response to a shortfall for the administrative General Revenue Fund

(Fund 101) – not a shortfall for the IGT Fund (Fund 139) or the Title XIX Fund (Fund 163). *L.F. at 94-95, 123.* The Governor relied on article IV, § 27 in withholding the second enhanced payments. *Tr. at Exh F 1151-52.* That section lets the Governor "reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." Mo. Const. art. IV, § 27.

F. Revenue Estimates and Actual Revenues

The trial court found that the appropriations in § 11.445 were based on revenue estimates for their respective Funds: the IGT Fund appropriation in § 11.445 was based on the SFY 2002 revenue estimate for the IGT Fund (Fund 139); the Title XIX Fund appropriation in § 11.445 was based on the SFY 2002 revenue estimate for the Title XIX Fund (Fund 163). *L.F. at 121*.

The trial court found that SFY 2002 actual revenue to the IGT Fund was $363,000,000.[4] *L.F. at 116.* This actual revenue was greater than any revenue estimate for the Fund. *L.F. at 100, 114, 116*; *Tr. at Exh F 778, 1115-17.* Specifically, the revenue estimate prepared by DOSS was $255,800,000; the Governor's revenue estimate in the budget submitted to the General Assembly was $94,603,501; and the revenue estimate of the General Assembly and Governor, as reflected by the appropriation bills finally passed

[4] The evidence was that actual revenue to the Fund was $363,037,869.67. *L.F. at 97.* $363,000,000 is an approximation. The difference is immaterial in this case.

after line-item veto and opportunity for legislative override, was $299,372,943.[5] *L.F. at 100, 114, 116*; *Tr. at Exh F 778, 1115-17.* Each of these revenue estimates was less than $363,000,000. *L.F. at 100, 114, 116*; *Tr. at Exh F 778, 1115-17.* Thus, for the IGT Fund appropriation, actual revenue was greater than the revenue estimate upon which the appropriation was based. *L.F. at 100, 114, 116, 121*; *Tr. at Exh F 778, 1115-17.*

The parties stipulated that total deposits to the Title XIX were $2,489,205,828.86, which was less than all revenue estimates for the Fund. *L.F. at 100, 101*; *Tr. at Exh F 777, 1115-17*. The Title XIX Fund contains federal money used to pay the federal share of Medicaid eligible expenses. *L.F. at 97, 98, 119, 120*; *see also* § 208.170.8, RSMo 2000.

The trial court also found that "[t]he whole state's Appropriations for Fiscal Year 2002 were based in part on the consensus revenue estimate." *L.F. at 115*. The consensus general revenue estimate is an estimate agreed upon by the Governor, General Assembly, the Office of Administration, and others. *L.F. at 99, 114*. It **only** estimates revenue for the administrative General Revenue Fund (Fund 101). *L.F. at 99.* It estimates no revenue for the IGT Fund (Fund 139) or the Title XIX Fund (Fund 163). *L.F. at 99.* For

[5] The trial court found that the sum of the appropriations was $299,360,576. *L.F. at 116*. The court did not add in a supplemental transfer of $12,347 passed by the General Assembly and approved by the Governor during SFY 2002. *L.F. at 100, 116*. The difference is immaterial, but this Brief uses the amount $299,372,943 for the sake of accuracy.

SFY 2002, the original consensus general revenue estimate was $6,862,700,000. *L.F. at 114*. Actual revenues for Fund 101 were $640,000,000 less than the original consensus general revenue estimate, and several hundred million dollars less than a revised consensus general revenue estimate. *L.F. at 117*.

For SFY 2002, the General Assembly and Governor appropriated a total of $19,367,000,000 for the whole state budget, after the Governor had exercised his line-item veto. *L.F. at 115*. Actual revenue for the state as a whole was $17,997,000,000. *L.F. at 116*. Thus, the state as a whole received less revenue than estimated. *L.F. at 115, 116*. As noted above, $640,000,000 of this shortfall was attributable to the General Revenue Fund (Fund 101) – the largest Fund in the State Treasury. *L.F. at 117*.

G. Attempted Rule Suspension

After the Governor publicized the May 10 withholdings, DOSS attempted to "suspend" the portion of the IGT Program rule pertaining to second enhanced payments – 13 CSR 70-10.150(1)B. *L.F. at 123.* DOSS filed a Notice of Rule Suspension with the Secretary of State which cited article IV, § 27, and §§ 208.201 and 536.022, RSMo as authority. *L.F. at 123*. Neither DOSS nor the Governor followed notice-and-comment or emergency rulemaking procedures in attempting to suspend 13 CSR 70-10.150(1)B. *L.F. at 124*.

13 CSR 70-10.150(1)B mandates disbursal of the second enhanced payments. The first paragraph of the rule provides: "The Medicaid enhancement pools **shall be** calculated and distributed in the manner described below." *Tr. at Exh F 411* emphasis

added). The subsections describe the manner for (1) calculating and (2) distributing both the first and second enhanced payments.

Subsection (C) addresses the total limit for first and second enhanced payments. *Tr. at Exh F 411*. Subsection (A) addresses first enhanced payments. *Tr. at Exh F 411*. Subsection (B) deals with second enhanced payments. *Tr. at Exh F 411*. Subparagraph 1 of subsection (B) describes the calculation of the second enhanced payments. *Tr. at Exh F 411*.

Subparagraph 2 mandates distribution of the second enhanced payments:

> The second pool **shall be distributed based** on a quarterly amount, made in addition to per diem payments, **to all Medicaid enrolled nursing facilities**, applicable to services provided in State Fiscal Year 2002, based on the pro-rata share of Medicaid days. *Tr. at Exh F 411* (emphasis added)

This language is clear and unconditional. Under the rule, second enhanced payments "shall be distributed." *Tr. at Exh F 411*.

13 CSR 70-10.150 incorporated SPA 00-08 into State law. *Tr. at Exh F 86, 411*. Both SPA 00-08 and the rule mandate two payments. *Tr. at Exh F 86, 411*. The pools are linked, and distributions from both pools are mandated. *Tr. at Exh F 86, 411*. In approving SPA 00-08, the federal government expected that the States could not receive federal money from first enhanced payments, without making second enhanced payments. *Tr. at Exh F 86*. The State apparently agreed that this was reasonable policy, and included the same requirement in 13 CSR 70-10.150. *Tr. at Exh F 411*.

By attempting to suspend only subsection B of the rule, the State was trying to obtain the profit from the first enhanced payment transactions [addressed under subsection A] without having to pay any of that profit to nursing homes as second enhanced payments [addressed under subsection B]:

> BY MR. HATFIELD [recross-examining Brian Kinkade, Director of DOSS's Division of Budget and Finance]:
>
> Q. It is a little counterintuitive, as I said. Just tell me if this is your understanding.
>
> If we don't make the efficiency grant payments [the second enhanced payments], that means we have a bigger upper payment limit and we can run more money through the first set of enhanced payments and generate more money for the State. Is that your understanding?
>
> A. That is my understanding.
>
> Q. So the less money we pay to the nursing homes, the more money we can get back from the enhanced payment of transfers the first time?
>
> A. That would be my understanding, yes.
>
> MR. HATFIELD: Thank you. No further questions.

Tr. at 115.

H. Proceedings Below and Post-Lawsuit First Enhanced Payment

Believing that the Governor's power to reduce expenditures below appropriations had not been triggered for the appropriations in § 11.445, Appellants sued the Governor, the Treasurer, the Commissioner of the Office of Administration (OA), the Department of Social Services (DOSS), its Director, the Director of the Division of Medical Services (DMS) within DOSS, and the Secretary of State[6] on June 12, 2002. *L.F. at 57-58.* On June 19, after the suit was initiated, DMS submitted an emergency amendment to rule 13 CSR 70-10.150. *L.F. at 123.* The emergency amendment would have changed 13 CSR 70-10.150's mandatory "shalls" to permissive "mays." *L.F. at 123.* That emergency amendment was withdrawn on June 24. *L.F. at 124.*

When they filed their suit, Appellants moved for an Order to Show Cause and a Temporary Restraining Order (TRO) to prevent lapse of the § 11.445 appropriations. *L.F. at 1-36.* The TRO hearing was originally scheduled for the next morning – June 13 – but was rescheduled to June 21. *L.F. at 108.* Between the date when the suit was filed and the new date of the TRO hearing, DOSS made an extra $20,700,000 first enhanced payment to the nursing homes operated by the local government entities in addition to the four quarterly payments already made. *L.F. at 104.* The local government operated entities transferred $20,700,000 to the local government entities. *L.F. at 104.* The local governments then transferred $20,700,000 to DOSS, which deposited the money in the IGT Fund (Fund 139). *L.F. at 104.* This money was not distributed to the nursing homes

[6] Appellants later dismissed the Secretary of State without prejudice. *L.F. at 109.*

as a second enhanced payment. *L.F. at 104.* This transaction netted the State $12,637,868 federal dollars. *Tr. at Exh F 87.*

Due to this payment, the State claims it has reached the federal government's "Upper Payment Limit" and cannot obtain any more federal matching money for SFY 2002. *Tr. at 99-100*. The Upper Payment Limit is the maximum amount the federal government will cumulatively contribute to Medicaid in Missouri. *Tr. at 99-100.*

At the June 21 hearing, the trial court entered a TRO enjoining lapse of the appropriation remaining in § 11.445. *L.F. at 37-39, 108*. On June 30, 2002, the fiscal year ended. *L.F. at 124*. After the trial court entered its judgment, Appellants moved for an injunction pending appeal to ensure that the appropriation authority did not lapse while the appeal was pending. *L.F. at 131-44*. The trial court sustained Appellants' motion, and entered an injunction pending appeal which continued the TRO "uninterrupted" (even though the court entered judgment against Appellants). *L.F. at 145-47.* The parties have stipulated that, absent the withholding, the remaining § 11.445 appropriation authority was sufficient to make the $20,795,140 in disputed second enhanced payments. *L.F. at 102*.

POINTS RELIED ON

I. The trial court erred by concluding that Respondents could lawfully refuse to disburse money that was set aside in the Intergovernmental Transfer (IGT) Fund and appropriated by the General Assembly in § 11.445 of House Bill 11 (2001) for payments to increase the quality of health care provided to nursing home residents because the Governor's power to reduce expenditures below appropriations under article IV, § 27 of the Missouri Constitution was not triggered, for the following reasons:

A. The IGT Fund appropriation was based on the revenue estimate for the IGT Fund and actual revenue for that Fund was more than estimated, so article IV, § 27, by its plain text, was not triggered for that appropriation;

B. If this Court believes that § 27 is ambiguous and considers extrinsic sources, the history of its adoption, interpretations of the provision since the time of enactment, and the practical effect of the different interpretations show that article IV, § 27 is triggered only for appropriations from a Fund when that Fund experiences a revenue shortfall;

C. The Separation of Powers doctrine requires strict construction of article IV, §27 because it confers legislative power on an executive official; and

D. Since article IV, § 27 was not triggered, Respondents' refusal to disburse the money appropriated by § 11.445 violates article II, § 1 of the Missouri Constitution, and constitutes an illegal impoundment.

Mo. Const. art. II, § 1

Mo. Const. art. IV, § 27

§ 33.290, RSMo 2000

State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo. banc 1973)

State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo. banc 1975)

State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228 (Mo. banc 1997)

State Hwy. Comm'n of Mo. v. Volpe, 479 F.2d 1099 (8th Cir. 1973)

II. The trial court erred by concluding that the Respondents could lawfully refuse to disburse federal money that was set aside in the Title XIX Fund and appropriated by the General Assembly in § 11.445 of House Bill 11 (2001) for payments to increase the quality of health care provided to nursing home residents because:

A. The Governor's action was arbitrary, capricious, and unreasonable in that he did not determine the revenue estimate upon which the § 11.445 Title XIX Fund appropriation was based or the amount of actual revenue for the Title XIX Fund; and

B. Since federal money is held by the State in trust and cannot be used contrary to its federal purpose under article IV, § 15 of the Missouri Constitution, the Governor's power to reduce expenditures below appropriations under article IV, § 27 of the Missouri Constitution does not apply to the appropriation of federal money from the Title XIX Fund. The Governor's refusal to disburse was an unlawful impoundment and a violation of Separation of Powers (article II, § 1 of the Missouri Constitution).

Mo. Const. art II, § 1

Mo. Const. art. IV, § 15

13 CSR 70-10.150

Missouri State Medicaid Plan Amendment 00-08

Comm. for Educational Equality v. State, 967 S.W.2d 62 (Mo. banc 1998)

Mallory v. Barrera, 544 S.W.2d 556 (Mo. banc 1976)

State Hwy. Comm'n of Mo. v. Volpe, 479 F.2d 1099 (8th Cir. 1973)

LEGAL ARGUMENT

I. The trial court erred by concluding that Respondents could lawfully refuse to disburse money that was set aside in the Intergovernmental Transfer (IGT) Fund and appropriated by the General Assembly in § 11.445 of House Bill 11 (2001) for payments to increase the quality of health care provided to nursing home residents because the Governor's power to reduce expenditures below appropriations under article IV, § 27 of the Missouri Constitution was not triggered, for the following reasons:

A. The IGT Fund appropriation was based on the revenue estimate for the IGT Fund and actual revenue for that Fund was more than estimated, so article IV, § 27, by its plain text, was not triggered for that appropriation;

B. If this Court believes that § 27 is ambiguous and considers extrinsic sources, the history of its adoption, interpretations of the provision since the time of enactment, and the practical effect of the different interpretations show that article IV, § 27 is triggered only for appropriations from a Fund when that Fund experiences a revenue shortfall;

C. The Separation of Powers doctrine requires strict construction of article IV, §27 because it confers legislative power on an executive official; and

D. Since article IV, § 27 was not triggered, Respondents' refusal to disburse the money appropriated by § 11.445 violates article II, § 1 of the Missouri Constitution, and constitutes an illegal impoundment.

This Point raises legal issues. The material facts supporting Appellants' claim are not disputed. The parties stipulated to most, but not all, of the facts in this case. *L.F. at 91-107*. Like the trial court, this Court is bound by the parties' stipulations of fact. *Bull v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. App. 1999). The trial court also made findings of fact. Those findings are entitled to deference if supported by substantial evidence. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

An appellate court reverses a trial court judgment that wrongly declares or applies the law. *Id*. The trial court's conclusions of law receive no deference. *Id*.; *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444 (Mo. banc 1994). Constitutional interpretation is a question of law for the Court to decide.

Summary of the Argument

This case involves $20,795,140 in payments lawfully appropriated by the General Assembly "for one-time payments to nursing homes to increase quality and efficiency" of health care for elderly nursing home residents. *L.F. at 120-21*. These payments were financed entirely by the federal government: (1) the state share of the payment is recycled "profit" obtained by making first enhanced payments to local government nursing homes and receiving the same amount as a return transfer; and (2) the federal share is federal matching money. *L.F. at 119-20*.

The state obtains this money through its IGT Program. To implement that program, the State: (1) amended its Medicaid agreement with the federal government; and (2) promulgated a rule. *L.F. at 117-18*. It also set up a separate Fund in the Treasury – the IGT Fund (Fund 139) – to segregate revenue obtained from this Program. *Tr. at 330-31*. The clear understanding between the State and the federal government (as reflected by SPA 00-08) and the citizens of Missouri (as reflected by 13 CSR 70-10.150) was that the additional federal "profit" obtained through the first enhanced payment step would be used by the State to increase reimbursement for care for nursing home residents through second enhanced payments.

In fact, the IGT Program operated just that way. Profit obtained through the Program was deposited in the IGT Fund in the Treasury. *L.F. at 119-20*. In the budget process for SFY 2002, DOSS and the Governor both recommended that the General Assembly use the IGT Program revenue in that separate Fund for payments to increase the quality of health care for nursing home residents. *Tr. at Exh F 779*. In § 11.445, the General Assembly followed these recommendations and appropriated money from the IGT Fund for payments to nursing homes. *L.F. at 120-21*. These payments would be matched with federal money from the Title XIX fund. *L.F. at 120-21*. The Governor approved the appropriations: he did not veto or line-item veto any portion of the appropriation. *L.F. at 121*.

During SFY 2002, the State actually received $60,000,000 more in revenue from the IGT Program than the General Assembly had appropriated from the IGT Fund. *L.F. at 116*. The IGT Fund had $60,000,000 more revenue than estimated. *L.F. at 116*. Yet,

the Governor withheld over $20,000,000 of the payments intended to benefit nursing home residents, because **other** Funds in the Treasury were experiencing revenue shortfalls. *L.F. at 122-23*. In support, the Governor cited article IV, § 27. *Tr. at Exh F 1151-52*. Under that section, the Governor can withhold appropriations when "actual revenues are less than the revenue estimates upon which the appropriations were based." Mo. Const. art. IV, § 27.

This case requires this Court to interpret the scope of § 27. Does the Governor have unfettered power over the whole budget? Or, must he exercise his power consistent with the general priorities established in the constitutional process?

The General Assembly appropriates from distinct accounting units in the Treasury (Funds), and bases its appropriations on revenue estimates for those Funds. Therefore, article IV, § 27 is triggered for appropriations from a Fund that experiences a revenue shortfall. Throughout this lawsuit, Respondents derided this interpretation as a "full frontal assault on the Governor's authority to exercise his right to balance the budget." *Tr. at 71*. They suggested that the State budget must be viewed as a whole, and that the Governor's power is triggered when revenues for the State as a whole fall below revenue estimates. *Tr. at 72*. Under this "whole budget" theory, the Governor would not review appropriations individually – rather he would treat them the same and the Governor could reduce any appropriation when actual revenues for the budget taken as a whole are less than estimated. *Tr. at 72*. In effect, Respondents contend that the Governor has a continuous line-item veto.

The article IV, § 27 power must be exercised consistent with the fiscal priorities established by the General Assembly and approved by the Governor through the constitutional budgeting process. Therefore, the Governor can reduce expenditures below appropriations only if the Fund from which that money was appropriated suffers a revenue shortfall. This interpretation is dictated by the text of § 27 and the appropriation laws. It respects the primacy of the General Assembly in the appropriation process, and allows the Governor to maintain a balanced budget, Fund-by-Fund.

This interpretation does not remove the Governor from the budgetary process. Rather, he can assert his priorities in his budget, fight for them during the lawmaking process, and enforce them with his veto. But, the General Assembly can override those vetoes, and thus has exclusive appropriation authority. Mo. Const. art. III, § 32. After the appropriation bills become law, the Governor cannot use his § 27 power to undo all that has come before.

The trial court found that the § 11.445 IGT Fund appropriation was based on the IGT Fund revenue estimate. This finding was correct as a matter of fact and as a matter of law. The trial court erred by not entering judgment for Appellants.

A. The IGT Fund appropriation was based on the revenue estimate for the IGT Fund and actual revenue for that Fund was more than estimated, so article IV, § 27, by its plain text, was not triggered for that appropriation.

In construing a constitutional provision, the Court must give effect to its intent and purpose as discerned from the words used. *Buechner v. Bond*, 650 S.W.2d 611, 612-13 (Mo. banc 1983). Word choice is presumed intentional. *Id.* Language should be

interpreted in context. *Id*. Constitutional language "must not be construed in the abstract but should be defined in light of the construction that those who drafted and adopted the provision must have believed would be placed upon it." *Poertner v. Hess*, 646 S.W.2d 753, 756 (Mo. banc 1983). The Court must consider the particular provision at issue, related provisions, and the constitution as a whole. *Roberts v. McNacy*, 636 S.W.2d 332, 335 (Mo. banc 1982). Constitutional provisions should be harmonized. *Id.*

Contemporaneous history can be considered. *See State ex rel. Russell v. State Highway Commission*, 42 S.W.2d 196, 202 (Mo. banc 1931). Constitutional debates are instructive, but not controlling. *See, e.g., City of Springfield v. Clouse*, 206 S.W.2d 539, 544 (Mo. banc 1947).

Express exceptions to the doctrine of Separation of Powers are strictly construed. *See, e.g., Brown v. Morris*, 290 S.W.2d 160, 168-69 (Mo. banc 1956). This is especially true with appropriations: "when the Governor takes part in appropriation procedures, he is participating in the legislative process and the language conferring such authority is to be strictly construed." *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392 (Mo. banc 1973).

The central issue in this case is the proper interpretation of the triggering language in article IV, § 27: "whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." The undisputed facts support Appellants' claim. As the trial court found, "**[t]he §11.445 IGT fund appropriation was based upon the SFY 2002 IGT fund (fund 139) revenue estimate.**" *L.F. at 121* (Finding 98; emphasis added). SFY 2002 actual revenue to the IGT Fund was greater than all

estimates. *L.F. at 100, 114, 116, 121*; *Tr. at Exh F 777, 1115-17.* Therefore, based on the plain text of § 27, the Governor's power to withhold was not triggered for appropriations from the IGT Fund.

Article IV, § 27 lets the Governor reduce expenditures below appropriations in limited instances:

> The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based.

Mo. Const. art. IV, § 27. This provision was first adopted in 1945, and has not been changed since.

This Point turns on the proper interpretation of § 27's triggering language: "whenever actual revenues are less than the revenue estimates upon which the appropriations were based." Previous cases have not considered the meaning of the triggering language. *See State ex rel. Sikeston R-VI Sch. Dist. v. Ashcroft*, 828 S.W.2d 372, 376 (Mo. banc 1992); *State ex rel. Teasdale v. Spainhower*, 580 S.W.2d 303, 306 (Mo. banc 1979); *State ex. inf. Danforth v. Merrell*, 530 S.W.2d 209, 214 (Mo. banc 1975); *Greene County v. State*, 926 S.W.2d 701, 702-03 (Mo. App. 1996). In *Sikeston* and *Greene County*, the courts assumed – as the parties in those cases did – that article IV, § 27 was triggered. *Sikeston*, 828 S.W.2d at 376; *Greene County*, 926 S.W.2d

at 702-03 ("Neither party disputes the governor's exercise of power to reduce the rate of reimbursement."). They did not interpret the phrase "revenue estimates upon which the appropriations were based." *Sikeston*, 828 S.W.2d at 376; *Greene County*, 926 S.W.2d at 702-03.

Before parsing the text, the purpose and placement of § 27 must be considered to give context to the words used. *See, e.g., Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991) ("Context determines meaning."). Article IV, §§ 22-27 and 28 are a related group of constitutional provisions that are construed together. They are grouped together under the heading "Revenue," presumably because budgeting was originally administered by the Department of Revenue.[7] *Cf.* Mo. Const. art. IV, §§ 29-50 (the other departments have similar headings that precede their respective constitutional provisions). In the original 1945 Constitution, §§ 22-27 and 28 were an uninterrupted segment, because article IV, §§ 27(a) and 27(b) had not yet been adopted. *See 1946 Mo. Laws 24-25* (the 1945 Constitution as originally enacted). Sections 22-27 and 28 describe the constitutional process for appropriating money from the State Treasury. *See* Appendix at A24.

[7] When the Constitution was amended to reorganize the executive department, the Department of Revenue's budgeting responsibility was ended. *Compare 1972 Mo. Laws 1050* (article IV, § 22), *with 1945 Mo. Laws 23-24* (article IV, § 22 as originally enacted). Now, the Office of Administration is responsible for budgeting. § 37.010.3, RSMo 2000.

First, the Department of Revenue collects taxes. Mo. Const. art. IV, § 22. Then, §§ 23-25 set forth the legislative process for appropriations, modifying the article III legislative process. Mo. Const. art. IV, §§ 23-25. The Governor prepares a comprehensive budget, which becomes the starting point for the legislature's appropriation bills. Mo. Const. art. IV, §§ 24, 25. After the appropriation bills are finally passed, the Governor can veto or line-item veto appropriation bills, individual appropriations, or portions of those appropriations. Mo. Const. art. IV, § 26; *see also* Mo. Const. art. III, § 31. The General Assembly can override the Governor's veto. Mo. Const. art. III, § 32; *Sikeston*, 828 S.W.2d at 375. After bills become laws, the Governor controls the rate of expenditure through allotments and can reduce expenditures below appropriations in certain instances. Mo. Const. art. IV, § 27. Finally, the Commissioner of Administration must verify that actual expenditures are made consistent with valid appropriations. Mo. Const. art. IV, § 28.

Generally, these sections use the term "appropriations." Appropriations authorize expenditures from the State Treasury. *Sikeston*, 828 S.W.2d at 376. Appropriations must specify their amount and purpose, and may also specify the accounts from which money is appropriated. Mo. Const. art. III, § 23 (appropriation bills "may embrace the various . . . **accounts** for which moneys are appropriated" (emphasis added)); Mo. Const. art. IV, § 23.

The easiest way to understand these provisions is to examine actual appropriations. For example, consider § 11.445 and the appropriations at issue in this case:

Section 11.445. To the Department of Social Services

For the Division of Medical Services

For the purpose of funding one-time payments to nursing homes to increase quality and efficiency, to provide one-time funding of $2,800,000 for high Medicaid volume facilities, and to provide one-time funding of up to $1,900,000 for facilities reimbursed less than $85 per bed day.

Additionally, up to $200,000 provided within this section may be used for a comprehensive evaluation of turnover and care within the nursing home industry.

From Federal Fund ..... $ 81,196,500

From Intergovernmental Transfer Funds 51,803,500

Total (0 F.T.E.) $133,000,000

Tr. at Exh F 438; *2001 Mo. Laws 167*.

Section 11.445 appropriates money to "the Department of Social Services," authorizing DOSS to expend money from the Treasury. *See Sikeston*, 828 S.W.2d at 376. As required by article IV, §23, it specifies the total amount of the appropriations: $ 81,196,500 from "Federal Fund" and $ 51,803,500 from "Intergovernmental Transfer Funds." *See* Mo. Const. art. IV, § 23. Section 11.445 also specifies the "accounts" – the Funds – from which it is appropriating. Mo. Const. art. III, § 23.

These components of appropriations are agreed to by the General Assembly during the "budget" process. When the Constitution addresses all the appropriations

collectively, it refers to them as the "budget." *See* Mo. Const. art. IV, § 25 (General Assembly cannot pass its own appropriations until it acts on "all the **appropriations** recommended in the **budget**" (emphasis added)); *see also* Mo. Const. art. IV, § 24. Aside from the "budget" provisions, §§ 22–27 and 28 concern individual appropriations – not the "budget" collectively.

Under § 27, agencies cannot expend money appropriated to them unless the Governor "allots" appropriation authority to them. *L.F. at 95*. Allotments are made for each appropriation. *L.F. at 95*. Through allotments, the Governor controls the rate of expenditure. *L.F. at 95*; Mo. Const. art. IV, § 27. Also, if the power is triggered, the Governor can reduce expenditures below the appropriated amount ("withhold"). *L.F. at 95*; Mo. Const. art. IV, § 27. He implements withholdings by decreasing the allotment of appropriation authority. *L.F. at 95*.

Clearly, § 27 gives the Governor allotment power over appropriations. *State ex inf. Danforth v. Merrell*, 530 S.W.2d at 214. In *Merrell*, the Supreme Court recognized that § 27 concerns the step in the control of expenditure of public money that occurs before actual expenditure – allotment. *Id*.; Mo. Const. art. IV, § 27; *1933 Mo. Laws 162-63* (Senate Bill 227, §§ 12, 13) (allotment happens before expenditure).

Thus, § 27 concerns a specific step in the process of expending money from the Treasury, and focuses on management of individual appropriations. It gives the Governor power to allot appropriation authority, extending that allotment power to reducing expenditures below appropriations in times of revenue shortfall. Section 27 power does not confer undifferentiated power over the "budget" to the Governor.

Cf. Mo. Const. art. IV, §§ 24-25. The Governor can use the power over individual appropriations to balance the entire budget only because the budget is the sum of the individual appropriations.

As is evident from § 11.445, appropriations do not authorize expenditures from the Treasury generally, but instead authorize expenditures from specific Funds in the Treasury. *See State ex rel. Fath v. Henderson*, 60 S.W. 1093, 1096 (Mo. banc 1901) (Treasury is not a common Fund). As the word "Funds" is used in this context, it means money "set aside for a specific purpose." *Black's Law Dictionary* 673 (6th ed. 1991); *see also Webster's New Twentieth Century Dictionary* 741 (2d ed. 1979). Each Fund in the Treasury is a separate accounting and legal unit. *L.F. at 94-95*; Mo. Const. art. IV, § 15. Revenue to and expenditures from a Fund are accounted for separately from money in all other Funds. *L.F. at 94-95*. The State Treasurer is constitutionally obligated to hold moneys "for the benefit of the respective funds to which they belong and disburse them as provided by law." Mo. Const. art. IV, § 15. Therefore, money cannot be moved between Funds without statutory authorization or an appropriation. *Id.*

Funds are treated as separate legal and accounting units, because the General Assembly uses them to segregate – "set aside" – money in the Treasury for specific purposes. *See, e.g., Fust v. Attorney General*, 947 S.W.2d 424, 430 (Mo. banc 1997) (General Assembly can create special funds in the Treasury). By appropriating from Funds, the General Assembly establishes the state's fiscal policy. The appropriation authorizes expenditure of a certain revenue source (and no other) for a certain purpose

(and no other). *See, e.g., Fath,* 60 S.W. at 1096 (money paid into special funds was "religiously devoted to the purposes specified by the Constitution").

The Supreme Court "has carefully guarded the constitutional command not to spend the people's money in a manner other than authorized by an appropriation law …. Compliance with the law is, of course, required to assure the integrity of the appropriation process." *Teasdale,* 580 S.W.2d at 306. The importance of protecting the integrity of the General Assembly's appropriations is reflected in two cases. In the first case, *State ex rel. Cason v. Bond,* the Court held that the Governor could not use his line-item veto to change the purpose of appropriations. 495 S.W.2d at 386, 392. The Governor claimed that his line-item veto power permitted him to strike the words setting out the purpose of an appropriation without vetoing the amount appropriated. *Id.* at 386. The Court strictly construed article IV, § 26, and held that it did not confer that power. *Id.* at 392. *Cason* confirms that the Governor's role in the appropriation process – a legislative process – is limited. 495 S.W.2d at 386.

In the second case, *State ex inf. Danforth v. Merrelll,* the Missouri Supreme Court held that the State Fiscal Affairs Committee (a legislative committee) acting with the concurrence of the Commissioner of Administration (an executive official) could not transfer appropriated money from one purpose to another purpose. 530 S.W.2d at 213-14. The Court concluded that a statute purporting to give that power authorized withdrawals from the Treasury inconsistent with appropriation laws, and thus was unconstitutional in contravention of article III, § 36. *Id.*; Mo. Const. art. III, § 36 (money can only be withdrawn consistent with an appropriation law).

Thus, the General Assembly – not the Governor or some other delegatee – must decide how to spend State money. The General Assembly decides which programs most deserve and need the State's limited resources. Because appropriations are based on revenue estimates, the General Assembly must decide which expenditures should not be financed if revenues are less than estimated. *See State ex rel. Averill v. Smith*, 175 S.W.2d 831, 833 (Mo. banc 1943) (a budget based on future income must be prospective).

In this case, the General Assembly set aside revenues from the IGT program – recycled state share and federal "profit" – in the IGT Fund. *L.F. at 119-20.* Segregating money in the IGT Fund ensured that the money from a dedicated revenue source (the IGT Program) would be used only for the specific purposes in the appropriation laws. The General Assembly appropriated this money for "second enhanced payments" – the other payment required by the IGT Program in addition to the profit-making first enhanced payment. *L.F. at 118-20*. The decision to segregate this revenue was quite rational. If the State was going to receive hundreds of millions of dollars in profit from the federal government for a specific purpose, it should set that revenue aside and account for it separately to assure that the second enhanced payments were made as promised to the federal government.

Turning to the plain text of § 27, the pertinent language is: "The governor . . . may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." Mo. Const. art. IV, § 27. In this case, the Governor can

reduce expenditures of an agency (DOSS) below the amount appropriated from the IGT Fund only if "the actual revenues are less than the revenue estimates upon which the appropriations were based."

In its most recent article IV, §27 case, the Supreme Court did not consider this issue. *Sikeston*, 828 S.W.2d at 375. There, public schools claimed the Governor could not reduce their appropriations, citing the special constitutional provisions relating to schools. *Id.* at 375. The Court decided the case on another issue, holding that desegregation payments ordered by the federal courts must be included in determining whether the public schools received less than their appropriations. *Id.* at 376-77. When desegregation payments were included in the calculation, public schools received more than was appropriated for them. *Id*. Therefore, the Governor's power to reduce appropriations was not implicated. *Id.* The *Sikeston* opinion carefully noted that the Governor withheld "general revenue appropriations," in response to a **general revenue** shortfall. *Id.* at 373, 376. Thus, to the extent *Sikeston* suggests the Governor's power to reduce might have otherwise been triggered, the case addresses only the power to reduce general revenue appropriations in response to a general revenue shortfall.

To determine "the revenue estimates upon which the appropriations were based," a court must look at the appropriations. Appropriations authorize expenditures from distinct units in the Treasury. *See* Mo. Const. art. III, §23. Each unit – a Fund – is separate from each other unit in the treasury for legal and accounting purpose. *L.F. at 94-95*. Money in the Treasury must be held for the benefit of its Fund and can only be disbursed as provided by law. Mo. Const. art. IV, §15. When the General Assembly

considers whether and how much to appropriate, it must look at each Fund and estimate how much revenue that Fund will receive. Otherwise, in appropriating from the Funds, it cannot know whether there will be any revenue to meet expenditures. Since Funds are stand-alone legal and accounting units, appropriations from the Funds are based on revenue estimates for the Funds. Hypothetically, the General Assembly could choose to appropriate from some accounting unit other than a Fund – e.g., the Treasury as a whole. Then, the appropriation would be based on the revenue estimate for that accounting unit. However, this hypothetical is not reality. At the time §27 was adopted in 1945 and under current practice, the General Assembly has always designated the Fund within the Treasury from which it is appropriating money. *See, e.g., 1945 Mo. Laws 108-154.*

In § 27, the phrase "of the state or any of its agencies" identifies the state entities whose expenditures can be reduced below appropriations. That phrase and similar phrases are used by §§ 22-27 and 28 as an all-encompassing term for every state entity. *See* Mo. Const. art. IV, § 23 ("The fiscal year of the state and all its agencies"); Mo. Const. art. IV, § 24 ("proposed expenditures of the state and all its agencies"). At trial, Respondents argued that the phrase "of the state or any of its agencies" implicitly modified the remote phrases "actual revenues" and "revenue estimates." This modification-by-implication argument was their textual justification for claiming that the Governor can reduce expenditures for the whole budget when revenues for the whole budget are less than estimated. Respondents, however, are wrong.

Well-established rules of constitutional interpretation demonstrate that the phrase "of the state or any of its agencies" does not modify the remote words "actual revenues"

and "revenue estimates." First, the last antecedent rule – which the Supreme Court has used to interpret constitutional texts – states that modifying phrases do not apply to remote words. *Rothschild v. State Tax Comm'n*, 762 S.W.2d 35, 37 (Mo. banc 1988) (quoting *Citizens Bank & Trust Co. v. Director of Revenue*, 639 S.W.2d 833, 835 (Mo. 1982)) (qualifying phrases apply to "the words or phrase immediately preceding and are not to be construed as extending to or including others more remote); *Thompson v. Comm. on Legislative Research*, 932 S.W.2d 392, 395 & n.3 (Mo. banc 1996) (per curiam). Thus, the phrase "of the state or any of its agencies" should not be construed to modify remote words.

Moreover, § 27 was drafted in conscious recognition of the last antecedent rule. When § 27 intends to apply the phrase "of the state or any of its agencies" to a remote term, it does so expressly, by substituting the possessive pronoun "their." "Their" refers to "the state or any of its agencies" because they are the only plural entities mentioned in the provision. Since § 27 expressly applies the modifier to "appropriations," the modifying phrase should not be implied where it was not expressly applied. If the text were meant to be interpreted as Respondents suggested, it would read as follows: "The governor . . . may reduce the expenditures of the state or any of its agencies below their appropriations whenever [their] actual revenues are less than [their] revenue estimates upon which [their] appropriations were based." Section 27's intentional use of the non-descriptive word "the" instead of "their" demonstrates that the "of the state or any of its agencies" does not modify the words "actual revenues" and "revenue estimates."

The General Assembly appropriates from Funds, and therefore bases its appropriations on Fund revenue estimates. In fact, a detailed statutory process is used to generate revenue estimates for each Fund. *See Averill*, 175 S.W.2d at 822 (summarizing the statutory budget process). Agencies estimate their required expenditures "for each fund." § 33.220, RSMo 2000; *see also* Omnibus State Reorganization Act of 1974, § 1.6(4)(a), *available in* 15 *Missouri Revised Statutes* app. B (2000). The State budget director in the Office of Administration estimates revenue "for each fund." § 33.240, RSMo 2000. The Governor reviews these estimates, and then submits his own budget, which includes his estimates of "revenues and expenditures for each fund." § 33.270(2), RSMo 2000; § 33.250, RSMo 2000. The focus on Funds in this process confirms that appropriations are based on Fund revenue estimates.

The Fund-specific interpretation of § 27 is also compelled by the fact that appropriations are **laws** passed by the General Assembly. To determine the revenue estimate upon which an appropriation law was based, the Court must look at legislative intent. In Missouri, legislative intent is discerned from the text of the laws – not from the subjective intent of individual legislators or the Governor. *See, e.g., Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 680 (Mo. banc 2000) (courts ascertain legislative intent from the language used); *Pipe Fabricators, Inc. v. Director of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983) (the trial court properly excluded the affidavit of a former state senator regarding the intent of a statute: "the court is bound by the express written law, not what may have been intended by an enactment").

The General Assembly is a legislative body composed of 163 representatives and 34 senators. Mo. Const. art. III, §§ 2, 5. During the budget preparation process, legislators and their staff receive revenue estimates from a variety of sources. *L.F. at 113-14*. They have access to revenue estimates prepared by agencies. *L.F. at 113*. They can read the Governor's budget, containing his revenue estimates for each Fund. *L.F. at 114*. They can informally contact the agencies, OA, or other state officials to question estimates, and make their own independent assessment of revenues. *L.F. at 113-14*; *Tr. at 124, 203*. The collective legislative intent regarding revenue estimates cannot be discerned by aggregating the subjective intent of individuals. Each individual legislator and the Governor may have relied on different revenue estimates, both for the budget as a whole and for particular Funds. Their collective intent can be discerned only from the laws they enact.

At the oral argument in the *Sikeston* case, the Supreme Court made this same observation. The Court questioned:

> COURT: . . . when is a revenue estimate a revenue estimate? What number do you use – the one the Governor comes up with in January, the one that the Senate budget committee comes up with some time in March, the one that the Governor has in June, **or is not the revenue estimate the bills actually signed by the Governor?**

Audio Tape: Oral Argument, in *State ex rel. Sikeston R-VI Sch. Dist. v. Ashcroft*, SC74523 (on file at the State Archives of the Secretary of State; emphasis supplied for this Brief).

Later in the argument, counsel for the Governor returned to the issue of the "revenue estimates upon which the appropriations were based":

> COUNSEL: … I believe there are two ways that you can compare the provisions in article IV, § 27 about whether the revenue is, actual revenue is less than revenue estimates upon which the appropriations were based. One is to compare it to the January budget to the actual revenues that are predicted in June or one the, the revenues that are predicted when the legislature acts which was slightly less than the 4.6 billion.
>
> COURT: Well in effect those two competing things come together and the only place they ever come together is when the Governor signs appropriation bills and **no matter what the General Assembly thinks the revenue estimate is and no matter what the Governor thinks the revenue estimate is, when those bills are signed that's the revenue estimate**.

Id. (emphasis supplied for this Brief).

In the appropriation laws, the General Assembly specifies the account or Fund in the Treasury from which the money may be expended. Thus, the laws themselves identify the accounting unit within the Treasury upon which the appropriation is based.

Section 11.445 appropriated money from the IGT Fund – an administrative account within the statutory General Revenue Fund. *L.F. at 121*. When the General Assembly appropriates from the statutory General Revenue Fund, it must appropriate from the accounts within it. § 33.571.2, RSMo 2000. The IGT Fund is a separate legal and accounting unit within the Treasury. *L.F. at 119-21*; Mo. Const. art. IV, § 15. Therefore, an appropriation from the IGT Fund is based on the revenue estimate for that Fund.

The trial court agreed, and correctly found as a question of fact that the § 11.445 IGT Fund appropriation was based on the revenue estimate for the IGT Fund. *L.F. at 121*. But, in its conclusions of law, the court misinterpreted § 27 by suggesting that the statutory General Revenue Fund was the proper unit to analyze. *L.F. at 129-30*. The trial court never found that the § 11.445 IGT Fund appropriation was based on the revenue estimate for the statutory General Revenue Fund. Section 11.445 appropriated money from the IGT Fund (Fund 139) – not the statutory General Revenue Fund. By concluding that the § 11.445 IGT Fund appropriation (which was based on the IGT Fund revenue estimate) could be reduced because actual revenue was less than estimated for some other accounting unit (upon which the IGT Fund appropriation was **not** based), the trial court ignored the plain text of § 27 which focuses on the revenue estimates "upon which the appropriations were based." It also ignored its own finding and the plain text of § 11.445 – an appropriation law. This misapplication of the law was error.

In addition to identifying the relevant accounting unit from the text of the appropriation laws, a Court can determine the total amount of expenditures authorized by adding the amount of all appropriations from the accounting unit. This amount – which

is evident from the appropriation laws – is also the implicit revenue estimate of the General Assembly and Governor. Because the Missouri Constitution requires a balanced budget, the authorized expenditures from a Fund are the minimum amount of revenue that the Fund is expected to receive. *See* Mo. Const. art. III, § 37 (general prohibition on state debt).

In this case, actual revenue to the IGT Fund for SFY 2002 was $363,000,000. *L.F. at 116*. The revenue estimate for the IGT Fund – as determined from the sum of the appropriations after line-item veto and any legislative overrides – was $299,372,943. *L.F. at 116*. Thus, actual revenue was **greater** than the revenue estimate upon which the § 11.445 IGT Fund appropriation was based, so § 27 was not triggered.

Even if the Court looks elsewhere to determine the amount of the revenue estimate, the result is the same. The record contains two other revenue estimates for the IGT Fund that could be the revenue estimate upon which the appropriation was based. The Form 9 revenue estimate prepared by DOSS was $ 255,800,000. *Tr. at Exh F 778, 1115-17*; § 33.240, RSMo 2000. The Governor's revenue estimate for the IGT Fund submitted to the General Assembly in his budget was $ 94,603,501. *L.F. at 114*; Mo. Const. art. IV, § 24; § 33.270(2), RSMo 2000. The $363,000,000 of actual revenue for the IGT Fund was greater than either of these revenue estimates. *L.F. at 116*.

Article IV, § 27 was not triggered for the § 11.445 IGT Fund appropriation, because that appropriation was based on the IGT Fund revenue estimate. Actual revenue for the IGT Fund was greater than any revenue estimate for that Fund. Therefore, the Governor could not reduce the expenditures of DOSS below that appropriation. By

concluding otherwise, the trial court misinterpreted and misapplied the law, and its judgment must be reversed. *Murphy*, 536 S.W.2d at 32.

B. If this Court believes that § 27 is ambiguous and considers extrinsic sources, the history of its adoption, interpretations of the provision since the time of enactment, and the practical effect of the different interpretations show that article IV, § 27 is triggered only for appropriations from a Fund when that Fund experiences a revenue shortfall.

If this Court finds the text of § 27 to be ambiguous, the next step is to consider the history of the provision, official interpretations of the Governor's power since it was enacted, and the practical effect of the different interpretations. Collectively, these factors show that, under Missouri's Fund system from the time of adoption until now, the Governor's power to reduce expenditures has applied only when the actual revenue to a Fund is less than appropriated expenditures. This interpretation respects the Fund system, and allows the Governor to adjust expenditures when revenues are less than estimated.

(1) Article IV, § 27 was drafted to give the Governor authority to reduce expenditures in times of revenue shortfall, constitutionalizing the principles adopted by the 1933 executive budget bill.

In interpreting an ambiguous constitutional provision, contemporaneous history and the history of the constitutional debates are relevant. *See Russell*, 42 S.W.2d at 202; *Clouse*, 206 S.W.2d at 544. Article IV, § 27 was added to the Missouri Constitution at

the 1943-44 Constitutional Convention. The historical impetus for article IV, § 27 was recorded by Professor Martin L. Faust.

Faust was a professor at the University of Missouri. Martin L. Faust, *Constitution Making in Missouri: The Convention of 1943-44*, at iii (1971). He was also closely involved in the 1943-44 Constitutional Convention. *Id*. He directed preparation of background studies, prepared the Organization Manual, and was involved with the actual convention, the adoption campaign, and implementation of the 1945 Constitution. *Id*. Faust chronicled the history of article IV, § 27. *Id*. at 88-89.

When the Great Depression hit in 1929, state revenues declined dramatically, and the state could not make good on its appropriations. *Id*. at 88. The Governor – Henry S. Caulfield – had no power to reduce expenditures. *Id*. at 88-89. He could only beg individual agencies not to spend state money (even though they had legal authorization). *Id*.

In 1933, the General Assembly responded by adopting the executive budget system in Senate Bill 227. *1933 Mo. Laws 459-63; see also 1933 Mo. Laws 480* (1932 amendment to article V, § 13 of the 1875 Constitution providing for a Governor's budget).[8] Section 12 of that bill gave the Governor control over allotments, and authorized him to reduce expenditures below appropriations in limited instances:

[8] The budget statutes were separated when they were codified. Senate Bill 227 passed in 1933 is a useful resource to understand how the executive budget system provisions interrelate. Though some provisions have changed, the framework of the system is intact.

> At the end of any quarterly period the governor may revise the allotments of any department, and if it shall appear that revenues **in any fund** for the year will fall below the estimated revenues **for such fund** to such extent that the total revenues **of such fund** will be less than the appropriations **from such fund**, then and in such case, the governor shall reduce the allotments of appropriations **from such fund** to any department or departments so that the total of the allotments for the fiscal year will not exceed the total estimated revenue **of the fund** at any such time.

Id. (emphasis added). By this section, the Governor was authorized to reduce expenditures from a Fund through allotments when revenue for that Fund was less than estimated. (This same statute is still in effect in Missouri, now codified as §33.290, RSMo 2000.)

The 1945 Constitution gave the Governor the same power to reduce appropriations when the actual revenues were less than revenue estimates "upon which the appropriations were based" – the Fund revenue estimates. As Faust observed, article IV, § 27 conferred power that was "already vested in the Governor by statute." Faust, *Constitution Making in Missouri,* at 88.

The history of the 1943-44 Constitutional Convention corroborates Faust's analysis. The Committee on State Finance (Except Taxation) drafted budgeting sections,

including the sections that ultimately became article IV, §§ 24-27.[9] During the debates, Franc McCluer – Chairman of that Committee – characterized the budgeting sections as "freez[ing] into the Constitution a system of executive budget control very much in accord with the present system of budgetary control in the State of Missouri." *1943-1944 Constitutional Convention Debates*, vol. XI at 3116-17 (May 19, 1944). The "system of budgetary control in the State of Missouri" was the executive budget system adopted in 1933. *1933 Mo. Laws 459-63*. The executive budget statute corresponding to article IV, § 27 was § 12 of Senate Bill 227 (the section quoted above).

The history of the text of article IV, § 27 also shows that it was based on § 12 of Senate Bill 227. The Organization Manual – distributed to delegates before the convention – included the state's executive budget statutes, and Fund-specific § 12 in particular. Martin L. Faust, ed., *Organization Manual for the Constitutional Convention of 1943*, at 83 (June, 1943). Section 27 and § 12 of Senate Bill 227 are textually similar. Both the constitutional provision and the statute use the same key phrases and word

[9] The Committee on State Finance drafted the most extensive budgeting sections. *See Report of Comm. on State Finance (Except Taxation) No. 11*, File No. 14 in the 1943-1944 Constitutional Convention of Missouri, at 3-5. However, the Committee on the Executive Department also included a section in their file that addressed budgeting. *See Report of Comm. on the Executive Dept. No. 4*, File No. 16 in the 1943-1944 Constitutional Convention of Missouri, at 7-8. As relevant here, they are substantially similar.

order: the power is triggered when revenues are less than estimated revenues. Further, an early committee draft of § 27 used the same unique phrase as the statute – "fall below" – to relate actual revenues to revenue estimates.[10] *Report of Comm. on State Finance (Except Taxation) No. 11*, File No. 14 in the 1943-1944 Constitutional Convention of Missouri at 4-5. Section 6 of File 14 – which became article IV, § 27 – stated that the power was triggered "whenever actual revenues **fall below** the revenue estimates upon which the appropriations were based." *Id.* (emphasis added). Since constitutional provisions should be written to endure over time, the final language of article IV, § 27 is more general than the language of the statute. Thus, § 27 of the Constitution adopts the principles of § 12 of Senate Bill 227, without engraving every detail in the Constitution. This approach gives § 27 flexibility, so that its principles can be applied even if the state budget statutes are amended. But, the similarities show that § 27 is a condensed and more general version of § 12 of Senate Bill 227.

Faust's analysis, McCluer's statements at the debates, and the similarity between the constitutional and statutory texts all show that article IV, § 27 was adopted to constitutionalize the Governor's power under § 12 of Senate Bill 227. Since the Fund system is still used today and § 11.445 appropriated money from Funds, Funds are the relevant accounting units for purposes of § 27.

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[10] In later revisions, the Committee on Phraseology substituted "are less than" for "fall below." *Report No. 1 of Committee No. 23 on Phraseology, Arrangement and Engrossment*, File No. 14 in the 1943-1944 Constitutional Convention of Missouri at 8-9.

(2) Since 1945, the General Assembly and Governor have interpreted the Governor's power to reduce expenditures to be triggered for Funds that experience revenue shortfalls.

Official interpretations of the Governor's power to reduce expenditures below appropriations also support Appellants. *See Akin v. Missouri Gaming Comm'n*, 956 S.W.2d 261, 264 (Mo. banc 1997) (official executive and legislative interpretations may be persuasive) (quoting *State ex rel. Randolph County v. Walden*, 206 S.W.2d 979, 984 (Mo. banc 1947)). The General Assembly re-enacted the executive budget statute corresponding to § 27 on April 26, 1946, a little more than one year after the 1945 Constitution became effective. *1946 Mo. Laws 3, 1447-48, 1464* (1945 Constitution was effective March 30, 1945). This statute contains detailed instructions regarding the Governor's allotment power, and specifically his power to reduce expenditures in times of revenue shortfall. *See* § 33.290, RSMo 2000. By reenacting this statute, the General Assembly (and Governor who approved the bill) showed that, under the Fund system, they interpreted the Governor's power to be triggered when a Fund experiences a revenue shortfall. Section 33.290 has been a part of the budgeting process in Missouri since the beginning of the executive budget system in 1933. This section reflects an official interpretation of the scope of the Governor's power to reduce expenditures below appropriations.

The Governor and General Assembly recently reaffirmed that the Governor's power to reduce expenditures is exercised consistent with the § 33.290 standard. In 1997, the General Assembly passed Senate Bill 240, adding a new subsection 2 to § 33.120:

> Any claim against the state for an item subject to statutory reimbursement which accrues during a fiscal year **in which the governor reduces an allotment of appropriations pursuant to section 33.290** shall be paid at such reduced rate regardless of the fiscal year in which the claim is submitted, if such claim is for an item identified by the governor as being subject to reduction.

1997 Mo. Laws 232-33 (emphasis added).

The Governor approved the bill. *Id.* For the fiscal note, the Office of Administration, Divisions of Accounting and Budget and Planning, Office of the Attorney General, and Office of the Governor were all consulted. *See* Fiscal Note, Senate Bill 240 (1997).

This new subsection is a legislative response to the holding in *Greene County v. State*, 926 S.W.2d 701 (Mo. App. W.D. 1996). There, the Governor exercised his article IV, § 27 power to reduce expenditures for certain appropriations. *Id*. at 702-03. The parties disagreed whether claims which accrued during the withholding year, but were submitted during the next fiscal year, were subject to the Governor's article IV, § 27 power. *Id*. at 703. The Court of Appeals held that expenditures within two months of the end of a fiscal year should be paid at the reduced rate, while later expenditures should be paid at the normal rate. *Id*.

Senate Bill 240 addresses this holding by making the date of accrual the relevant date regardless of the date when the claim was submitted. *1997 Mo. Laws 232-33.* For purposes of this case, the nuances of *Greene County* and Senate Bill 240 are irrelevant.

The important point is that the legislative response to *Greene County* recognizes that § 33.290 describes the conditions under which the Governor can withhold appropriated money. Thus, Senate Bill 240 expressly referenced § 33.290.

Therefore, even were this Court to find that § 27 is ambiguous, it should consider that shortly after its enactment and as recently as 1997, the General Assembly and the Governor **officially** recognized that article IV, §27 withholdings are made consistent with § 33.290.

(3) The "whole budget" theory would eviscerate the General Assembly's ability to set aside certain revenue sources for certain programs.

The Court should also construe § 27 to accomplish its practical objective. Under the whole budget theory, the Governor could reduce expenditures from any Fund in the budget whenever actual revenues for the state as a whole are less than estimated. *Tr. at 71*. In essence, this theory would give the Governor a continuous line-item veto, which would eviscerate the Fund system.

The breadth of the power the Governor claims is startling. The line-item veto is a powerful budgetary tool. But, it is checked by the General Assembly's ability to override the veto.[11] If the article IV, §27 power were interpreted as broadly as Respondents

[11] For example, when Governor Teasdale vetoed $44,000,000 in general revenue meant to finance the construction of the Truman State Office Building, the General Assembly overrode his veto. Earl W. Hawkey, *Politics of the Budgetary Process, in* Richard J. Hardy et al. eds., *Missouri Government and Politics* 191, 203 (1995)

argue, the Governor would be able – without any legislative check – to reduce any appropriation throughout the entire budget when revenues for the state as a whole are less than estimated. The Governor's power would be triggered for any of the more than **450 Funds** in which the General Assembly and Constitution have set revenues aside. *Tr. at 230-31*. This interpretation makes no sense, because revenues segregated in a distinct Fund in the Treasury may be entirely sufficient to finance all appropriations from that Fund. Moreover, the Governor can balance the state budget by balancing the budget of each individual Fund. The Governor does not need an unchecked, line-item veto to balance the budget. Construing § 27 to give him that power would not only be senseless; it would be dangerous.

A few examples will illustrate. The "Legal Defense and Defender Fund" has been created to segregate revenue paid to the state for the services of a public defender. § 600.090.5, RSMo 2000. Money in this Fund includes the (limited) amount that indigent defendants are able to pay toward their defense. § 600.090.1(1), RSMo 2000. It also includes other revenues of similar origin. *See* § 600.090.1(2), RSMo 2000 (defendants must pay if they later become able); §600.090.2, RSMo 2000 (amounts recovered by a lien on the defendant's property); § 600.093, RSMo 2000 (amounts repaid as a condition of probation). The legislature has strictly limited the uses to which money in the Legal Defense and Defender Fund can be put:

> The moneys credited to the legal defense and defender fund shall be used for the purpose of training public defenders, assistant public defenders, deputy public defenders and other

> personnel pursuant to subdivision (7) of subsection 1 of section 600.042, and may be used to pay for expert witness fees, the costs of depositions, travel expenses incurred by witnesses in case preparation and trial, expenses incurred for changes of venue and for other lawful expenses as authorized by the public defender commission. § 600.090.5, RSMo.

Thus, the legislature has responsibly chosen to dedicate revenue received from persons in need of legal services to the public defender program. Should the Governor be able to withhold expenditures from this Fund when its dedicated revenue source is more than sufficient to finance all appropriated expenditures?

Other examples abound. There are separate Funds for many of the licensing boards, containing revenue derived from their activities. *See, e.g.,* § 328.050, RSMo 2000 (establishing the "Board of Barbers Fund"). Should the Governor be allowed to keep a Board from spending its money as appropriated because some other Fund has less revenue than estimated? The Constitution establishes certain Funds to segregate specific taxes and revenues for limited purposes. *See, e.g.,* Mo. Const. art. IV, § 47(b) (sales tax levied under article IV, § 47(a) must be deposited in "Soil and Water Sales Tax Fund" and the "State Park Sales Tax Fund," and can only be used for the purposes specified in § 47(a)). Should the Governor be allowed to withhold appropriations from those constitutional Funds because some other Fund has less revenue than estimated?

In this case, the IGT Fund segregates IGT Program revenue (which ultimately comes entirely from the federal government) for certain purposes. The IGT program

described in SPA 00-08 and 13 CSR 70-10.150 specifically provides that second enhanced payments will be made to all nursing homes. For SFY 2002, the IGT Fund in fact received the estimated revenue from the federal government (and $60,000,000 more). Should the Governor be allowed to repudiate the State's promises to the federal government and citizens of Missouri and refuse to make the payments to provide health care for its elderly citizens?

In every case, the answer is "No." The General Assembly has the prerogative to dedicate specific revenues to specific purposes. It accomplishes this objective by setting revenues aside in a Fund, and then appropriating the money from that Fund. If article IV, § 27 is properly interpreted, the Governor can reduce expenditures below appropriations from these Funds when the Funds receive less revenue than estimated. This interpretation makes sense: If the Funds will not receive enough money to meet appropriations, the Governor should be allowed to reduce expenditures to balance the budget of the Funds.

Under Respondents' "whole budget" theory, the Governor could withhold money appropriated from the Funds even though they received ample revenue. A withholding from those Funds would not help the State remedy shortfalls to other Funds because (1) money in Funds can only be used for a limited purpose, and (2) the money in that Fund cannot be transferred out of the Fund without legislative authorization. Mo. Const. art. IV, § 15 (money in Funds can only be disbursed as provided by law). Even so, under the "whole budget" theory when, the Governor's power is triggered for all Funds in the Treasury, he can reduce **any** appropriation, regardless of the withholding's effect or non-

effect on actual state finances. This sweeping power invites any Governor to use (or threaten to use) article IV, § 27 to cut off state financing for any program that he or she dislikes regardless of the policy choice made by the legislature. Moreover, this power could be used by a Governor ideologically opposed to particular government services to radically reduce those services, even though the General Assembly appropriated money for them and he approved them (when his veto would have been subject to legislative override).

Respondents' "whole budget" theory gives the Governor breathtaking power. On the other hand, if the Governor must look to see if actual revenue is less than revenue estimates for the Fund from which the appropriation was made, the Governor has the necessary power to adjust expenditures to actual revenues.

C. The Separation of Powers doctrine requires strict construction of article IV, § 27 because it confers legislative power on an executive official.

The "whole budget" theory would accumulate unchecked legislative power in the Governor, an executive official. Such accumulations are directly contrary to the fundamental principle of Missouri government – Separation of Powers. Though one branch can assume another branch's power if expressly authorized, this Court strictly construes exceptions to the Separation of Powers doctrine to ensure that the exceptions do not subsume the division of powers.

Separation of Powers is vital to American government. *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). The doctrine is not meant to promote efficiency. *Myers v. United States*, 272 U.S. 52, 293 (1926)

(Brandeis, J., dissenting), *quoted in State Auditor*, 956 S.W.2d at 231; *Mo. Coalition for the Environment v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 135 (Mo. banc 1997). Rather, the doctrine precludes the exercise of arbitrary power through the friction it creates. *Id*. By dividing the powers of government, the public is protected from "the abuses of power that would surely flow if power accumulated in one department." *State Auditor*, 956 S.W.2d at 231 (citing *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 73-74 (Mo. banc 1982)).

Missouri's Constitution has always included this structural protection. *Albright v. Fisher*, 64 S.W. 106, 108 (Mo. banc 1901) (noting changes to the provision since 1820). The current version divides the powers of government between the three departments as follows:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. art. II, § 1; *see also* Mo. Const. arts. III, IV, V.

A branch can exercise the power of another branch only if "expressly directed or permitted" to do so under the constitution. Mo. Const. art. II, § 1. If a state official

believes he is expressly permitted to exercise another branch's power, it is his duty "to point out – to place his finger on – the very identical provision of the constitution on which he relies to support his plea of justification; and, unless this can be done, he stands defenseless before the bar of the court." *Albright*, 64 S.W. at 108.

Constitutional provisions expressly permitting one branch to exercise the power of another branch are strictly construed. *See, e.g., State ex inf. Danforth v. Cason*, 507 S.W.2d 405, 419 (Mo. banc 1973) (per curiam) (the lieutenant governor's role in the legislative process must be strictly construed); *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806, 817 (Mo. banc 1957). Given the importance of separation of powers, strict construction of the exceptions makes sense. Like a river running to the ocean, power seeks more power. Broadly construed and zealously used, the exceptions would subsume the doctrine itself, subjecting the public to arbitrary and tyrannical government: "When the legislative and executive powers are united in the same person or body . . . there can be no liberty . . . ." *The Federalist No. 47* (James Madison) (quoting Montesquieu).

The Separation of Powers doctrine prohibits one branch from (1) impermissibly interfering with another branch in the performance of its power, or (2) assuming a power that more properly belongs to another branch. *State Auditor*, 956 S.W.2d at 231. For example, the article IV, § 26 veto permits the Governor to interfere with the legislative process. Though textually authorized, it is strictly construed. *Cason*, 495 S.W.2d at 392; *Atterbury*, 300 S.W.2d at 817.

Likewise, article IV, § 27 is an exception to the Separation of Powers doctrine; it lets the Governor assume limited legislative power to set state fiscal priorities and make

appropriation decisions. *See State Auditor*, 956 S.W.2d at 231 (the Separation of Powers doctrine is violated when one branch assumes another branch's power). Like the veto, § 27 must be strictly construed. *See, e.g., Cason*, 495 S.W.2d at 392.

The trial court concluded that "If there is doubt about how to construe Constitutional provisions, they should be interpreted broadly," citing *Roberts v. McNacy*, 636 S.W.2d 332, 335 (Mo. banc 1982). This blanket statement is wrong for multiple reasons.

First, *Roberts* was a Hancock Amendment case, where there were not competing constitutional interests. 636 S.W.2d at 334. A blanket rule of broad construction might make sense in that context, but is meaningless in the Separation of Powers context where, by definition, the Court's task is to reconcile constitutional powers. *Cason* recognizes this point by holding that the Governor's power under § 26 is to be narrowly construed.

Second, a careful review of § 27 shows that the Governor's powers are legislative just as the § 26 powers at issue in *Cason* were legislative. 495 S.W.2d at 392. The power to appropriate money and set state fiscal priorities is legislative. Mo. Const. art. III, §§ 1, 36, art. IV, § 28; *see also Merrell*, 530 S.W.2d at 213-14; *Cason*, 495 S.W.2d at 392. As the chief executive officer of the State, the Governor's duty is "to administer and enforce the laws as written." *State Auditor*, 956 S.W.2d at 231 (quoting 16 C.J.S. Constitutional Law, § 214); *see also* Mo. Const. art. IV, §§ 1, 2. He does not have independent lawmaking power, but implements the General Assembly's policy choices. *See, e.g., Bd. of Educ. of the City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001) (where two statutory subsections were inherently contradictory, neither the

judiciary nor the executive had "legislative power to supplement or correct" the statute, and the statute was void for vagueness); *Budding*, 19 S.W.3d at 680, 682 (the primary goal in interpreting a law is to ascertain the legislature's intent).

When the Governor assumes the power to control the rate of expenditure for appropriations to DOSS, he is acting legislatively. The General Assembly appropriates money to many state agencies and other actors, which have discretion, within the appropriation laws, to execute their appropriations. The Missouri Constitution does not establish a "unitary executive," and therefore the Governor has no inherent authority to directly control the agencies and the manner in which they execute their appropriations. *See* Mo. Const. art. IV, § 12. The Constitution establishes six different elective positions within the executive branch: the Governor, the Lieutenant Governor, the Attorney General, the Secretary of State, the Treasurer, and the Auditor. *See* Mo. Const. art. IV, § 17. The Constitution also divides the executive branch into a number of agencies. Mo. Const. art. IV, § 12. *See generally* Mo. Const. art. IV, §§ 22-51; Omnibus State Reorganization Act of 1974 § 1.5(1), *available* in 15 *Missouri Revised Statutes* app. B (2000). DOSS is established by article IV, §37 of the Missouri Constitution. The Director of DOSS has charge over the agency. Mo. Const. art. IV, § 37. The Governor appoints the director and may remove her, but he cannot directly order her to take action. Mo. Const. art. IV, §§ 37, 51; Omnibus State Reorganization Act of 1974 § 1.6(1) ("The head of each department shall serve at the pleasure of the governor unless otherwise provided by the constitution or this act."). His control is asserted indirectly, through his appointment and removal power and his line-item veto. *Id.*; Mo. Const. art. IV, § 26.

Thus, without a constitutional or statutory allotment provision, the Governor could not control DOSS's discretion in executing its appropriations. The Governor has inherent executive power to execute appropriations to his office, but does not have inherent executive power to interfere with DOSS's execution of its appropriations. Without § 27 or a statute like § 33.290, a Governor who took it upon himself or herself to "allot" an appropriation would contravene Separation of Powers by making a legislative decision of who shall allot. Section 27 reflects a constitutional decision to give that legislative power to the Governor under specified circumstances. *See* Faust, *Constitution-Making in Missouri*, at 88-89 (the executive budget statutes and § 27 were enacted to allow the Governor to control expenditures in times of revenue shortfall – a power he did not have even though he was the chief executive officer).

This exception does not upset the Separation of Powers, because DOSS already has inherent discretion to control the rate at which it expends its appropriations. The first phrase in § 27[12] transfers this executive discretion from DOSS to a different executive official (not named in the text of the appropriation laws). This transfer is a legislative act. Accordingly, the allotment power conferred on the Governor is a limited Separation of Powers exception.

[12] "The governor may control the rate at which any expenditure is expensed during the period of the appropriation by allotment or other means …." Mo. Const. art. IV, § 27.

The second phrase in § 27[13] extends the allotment power to allow the Governor to reduce expenditures below appropriations in times of revenue shortfall. It is also a limited exception to Separation of Powers. The power to reduce expenditures below appropriations is the power to prohibit agencies from executing their appropriations. The Governor reduces the allotment of appropriation authority to an agency below the amount appropriated, preventing a distinct constitutional actor such as DOSS from expending money even though the General Assembly has authorized the expenditure. As noted above, the Governor cannot directly control DOSS under the Missouri Constitution. If triggered, the second phrase in § 27 lets the Governor prohibit execution of appropriations of other agencies by reducing expenditures below appropriations. Like the general allotment power, the specific power to prohibit agencies from executing appropriation laws is also a power that the Governor would not have unless given to him by statute or the Constitution. His general executive power does not include the power to control other agencies in their execution of appropriations from the legislature. By giving him the power to prohibit execution of appropriations, § 27 confers legislative power on the Governor.

Properly interpreted, the Governor's limited § 27 power does not upset the Separation of Powers. When revenue to a Fund will be insufficient to meet appropriated

[13] "The governor … may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." Mo. Const. art. IV, § 27.

expenditures, a rationing decision for the Fund must be made. There is not enough money to go around, and some appropriations will not be financed. Multiple agencies may receive appropriations from a Fund, and thus no particular agency will be in a position to decide which appropriations should ultimately be expended. In fact, each agency which realizes a revenue shortfall is imminent has a strong incentive to spend before revenue to the Fund is depleted by other agencies. Section 27 shifts the responsibility for making the rationing decision to the Governor. This power is legislative, but under Appellants' theory it is limited to the necessity at hand. The agencies to which the money was appropriated are not in a position to make the necessary rationing decision, therefore it is appropriate to create a limited exception to Separation of Powers under which the Governor may decide which appropriations from the Fund can be expended.

On the other hand, the "whole budget" theory undermines the Separation of Powers in the budget process. It allows the Governor to prohibit **any** agency from executing **any** appropriation from **any** Fund because revenue for different Funds in the Treasury have fallen short. This power is overbroad, because revenues set aside in particular Funds in the Treasury may be entirely sufficient to finance their specified appropriations. Under the "whole budget" theory, when the revenues for the whole budget are less than estimated, the Governor may eliminate any appropriation even though the General Assembly has authorized the expenditure, the Governor approved it (or had his line-item veto overridden), and revenue to the Fund from which the expenditure is more than estimated. Under that theory, the Governor would have power

to reorder state financial priorities without any legislative check. If the Governor has a "whole budget" power, it is not clear how the General Assembly would – if it could at all – set revenues aside for certain purposes. Effectively, the Fund system would be destroyed, representing a radical departure from Missouri law. Separation of Powers requires strict construction of § 27, as an exception to that principle.

In *Cason*, Governor Bond had used his line-item veto to strike the words establishing the purpose for certain appropriations, but left the amount appropriated intact. 495 S.W.2d at 387-88. The issue was whether the Governor's power to veto "items" of appropriation bills included the power to strike words. *Id.* at 389; *see also* Mo. Const. art. IV, § 26. The Court found that the Governor could not use the line-item veto to change the purpose of appropriations. *Cason*, 495 S.W.2d at 392. The Court took "cognizance of the fact that when the Governor takes part in appropriation procedures, he is participating in the legislative process and the language conferring such authority is to be strictly construed." *Id.*; *see also Brown*, 290 S.W.2d at 168.

Less than three years later, the Supreme Court decided another appropriation case, this time involving article IV, § 28. *State ex inf. Danforth v. Merrell*, 530 S.W.2d at 210. The Omnibus State Reorganization Act of 1974 purported to give the State Fiscal Affairs Committee (a legislative committee) and the Commissioner of Administration (an executive official) authority to transfer appropriated money from one purpose to another purpose. *Id.* at 211. The issue was whether those actors had "authority **to change, alter or amend the purpose** for which money appropriated by the general assembly may be used." *Id.* at 210 (emphasis added). Article IV, §28 provides that money cannot be

expended from the Treasury except as appropriated. *Id.* at 213. The Court held that the General Assembly could not give a legislative subcommittee and an executive official the power to change the purpose of appropriations – a change that the General Assembly can only effect by lawmaking. *Id.* at 213-14.

In a concurring opinion, Judge Bardgett synthesized *Cason* and *Merrell*:

> The basic issue here is whether or not the general assembly can constitutionally authorize a legislative committee and a representative of the executive branch of government, the commissioner of administration, **to amend an appropriation law by switching money from one legislatively designated purpose to a different legislatively designated purpose**.
>
> In *State ex rel. Cason v. Bond*, … the court held the governor could not constitutionally change the purpose clause of an appropriation bill under his veto powers.
>
> The case today holds that the general assembly cannot constitutionally delegate to a committee or to the executive department or to both of them the power to amend a law.

Merrell, 530 S.W.2d at 215 (Bardgett, J., concurring; emphasis added).

Under the "whole budget" theory, the Governor asks for the power to change the purpose of appropriations. Because the "whole budget" interpretation relies on revenue shortfalls for the whole budget rather than Funds, the Governor could withhold money

appropriated from a Fund for a specific purpose even though revenue to that Fund was sufficient to meet all expenditures. The decision to withhold money in a Fund – rather than expend it consistent with the appropriation law – is a change in the purpose of the appropriations. *Cason* denied Governor Bond that power under article IV, § 26. Three years later, *Merrell* denied the executive branch that power under article IV, § 28. The present Governor claims this same power, invoking article IV, § 27. This Court must strictly construe § 27 as an exception to Separation of Powers. Otherwise, the Governor will be given sweeping power over appropriations that *Cason* and *Merrell* have expressly held he does not have. There is simply no way to square Respondents' position with *Cason* and *Merrell*.

The Governor claims unfettered discretion to reduce expenditures anywhere in the budget, irrespective of the legislature's fiscal priorities. For example, as Budget Director Brian Long testified, the Governor was unwilling to withhold funding from education to balance the General Revenue Fund (Fund 101). *Tr. at 374-75*. Faced with this choice, the Governor decided to disregard the policy choices made by the General Assembly, and withhold payments appropriated in § 11.445.

A Governor might think that education is a more immediate state fiscal priority than health care for frail, elderly, and vulnerable nursing home residents. Subjective policy goals, however, do not warrant an overzealous concentration of power in one branch of government. *JCAR*, 948 S.W.2d at 134. Fiscal policy choices are made by the legislature. *See, e.g.,* Mo. Const. art. III, § 36. Our system of government does not rely on the benevolence of an all-powerful Governor to secure the liberty of the people.

JCAR, 948 S.W.2d at 134. It divides the power of government, because where the powers are joined, there is no liberty. *Id.*; *The Federalist Papers No. 47*. The "whole budget" theory gives the Governor plenary authority to reduce expenditures throughout the budget. Article IV, § 27 should be construed to avoid giving the Governor unchecked power over appropriations. Article IV, § 27 lets the Governor balance the budget of individual Funds when revenue the General Assembly has set aside in that Fund is insufficient to meet the General Assembly's appropriations from the Fund. It does not give the Governor power to look at another Fund with excess revenue, and reduce expenditures from that Fund to make up the shortfall for other Funds.

D. Since article IV, § 27 was not triggered, Respondents' refusal to disburse the money appropriated by § 11.445 violates article II, § 1 of the Missouri Constitution, and constitutes an illegal impoundment.

As described above, appropriation is a legislative power. The executive branch must execute an appropriation consistent with its language, just as it must execute any other law. *State Auditor*, 956 S.W.2d at 231. The executive's duty is to discern the legislative intent and implement it. *Id.*; *see also Budding*, 19 S.W.3d at 680 (the primary goal in interpreting a statute is to ascertain the legislature's intent). The executive cannot substitute its spending priorities for the General Assembly's. *See Merrell*, 530 S.W.2d at 213; *Cason*, 495 S.W.2d at 392. If it did so, the executive would be legislating.

The prohibition on impoundment of appropriated money is a specific application of these principles. The United States Supreme Court has held that when the legislature has apportioned money not to exceed stated maximums, the executive branch cannot

impound that money by setting forth a maximum allocation below the maximum established by Congress. *Train v. City of New York*, 420 U.S. 35 (1975). In a leading Eighth Circuit case, the court enjoined the executive from withholding appropriated money in order to control inflation. *State Hwy. Comm'n of Mo. v. Volpe*, 479 F.2d 1099, 1107-1109 (8th Cir. 1973). The Eighth Circuit forbade the withholding even though the general appropriation act did not specifically mandate the expenditure of all appropriated money. *Id.*

Missouri adheres to this general rule. Section 27 establishes the limited instances when the Constitution permits the Governor to withhold appropriated moneys. If article IV, § 27 is triggered, the Governor can reduce expenditures below appropriations. If § 27 is not triggered, the Governor cannot reduce expenditures below appropriations. Such impoundments ignore the General Assembly's directives, and violate Separation of Powers. Mo. Const. art. II, § 1.

The General Assembly has defined two other instances in which the Governor can withhold appropriated money. First, under § 33.290, agencies are required to reserve 3% of their appropriations, which can only be spent with the Governor's approval. *See, e.g.*, *Sikeston*, 828 S.W.2d 373 (noting 3% reserve). Second, when the General Assembly wants to confer discretion not to spend money, it uses an E appropriation. *Tr. at 240-41*. An E appropriation is an estimated appropriation. *Tr. at 240-41*. The General Assembly makes E appropriations by appropriating a specific dollar amount from a Fund, and appending the letter "E" to the appropriation. *Tr. at 241*. *See, e.g., 2001 Mo. Laws 168-69* (§ 11.465 of House Bill 11 – an example of an E appropriation). OA's Assistant

Director for Budget testified that such appropriations confer executive discretion to expend or transfer more or less than the specific amount appropriated. *Tr. at 240-41*. Thus, if the legislature intends to confer discretion, it uses an E appropriation.[14] The appropriations at issue here were not E appropriations. *Tr. at Exh F 438*; *2001 Mo. Laws 167*.

Article IV, § 27; § 33.290; and E appropriations describe the limited instances in which the executive can refuse to spend appropriated moneys. If they do not apply, the legislature intends for the money to be expended as appropriated.

Impoundment is unlawful not only because the General Assembly never authorized it by one of these means, but because, when the General Assembly enacted § 11.445, the State had already agreed with the federal government on SPA 00-08 and promulgated 13 CSR 70-10.150. 13 CSR 70-10.150 is a state law. *Page Western, Inc. v. Cmty. Fire Prot. Dist.*, 636 S.W.2d 65, 68 (Mo. banc 1982) (a rule has the force and effect of law, until repealed or amended). SPA 00-08 defines the federal purpose for IGT program money. *See Comm. for Educational Equality v. State*, 967 S.W.2d 62, 64-65 (Mo. banc 1998) (when the State accepts federal money, it holds that money as a

[14] The General Assembly cannot confer unlimited discretion. *See Merrell*, 530 S.W.2d at 213. In addition, a limitless appropriation violates article IV, § 23, which requires that "[e]very appropriation law shall distinctly specify the amount and purpose of the appropriation." This provision requires that the amount of the appropriation be capable of ascertainment. *See* Mo. Att'y Gen. Op. No. 56, Spainhower (March 19, 1976).

custodian, subject to the dictates of federal law). Both the rule and SPA 00-08 state that second enhanced payments "shall" be distributed. The General Assembly would have presumed these legal directives would be followed. *See Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000) (legislature is presumed to know the law at the time of enactment).

13 CSR 70-10.150(1)B was never lawfully suspended. The trial court's findings refer to the "attempted" suspension of 13 CSR 70-10.150(1)B, showing the court's belief that the rule was not suspended. *L.F. at 123-24*.

The Notice of Rule Suspension cited three authorities for the suspension: article IV, § 27, § 536.022, RSMo, and § 208.201, RSMo 2000. *L.F. at 123*. Article IV, § 27 addresses the Governor's power to reduce expenditures below appropriations. It does not give DOSS or the Governor the power to suspend rules. Section 208.201 gives DOSS's Division Medical Services the authority to promulgate rules. A "state agency" cannot amend or repeal rules without following notice-and-comment or emergency procedures. §§ 536.021, 536.025, RSMo 2000. The Notice of Rule Suspension did not satisfy those procedures. *L.F. at 124*. The rule suspension is thus invalid. *See NME Hosps., Inc. v. Dep't of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

The Notice of Rule Suspension also cited § 536.022:

> If any rule or portion of a rule of a state agency is suspended or terminated by action of the governor, a court or other authority, the state agency shall immediately file a notice of such action with the secretary of state.

§ 536.022.1, RSMo 2000. Other subsections specify the content of the notice, impose a duty to update, and describe the Secretary of State's duties. *See* § 536.022.2-4, RSMo 2000.

Section 536.022 assures that suspensions and terminations are published in the Missouri Register. It is a notice statute, and does not confer authority to suspend a rule. It presumes the power is granted by another legal authority. § 536.022.1. For example, the Governor can rescind rules under § 44.022.3(1) when there is an emergency. § 44.022.3(1), RSMo 2000. In this case, the Governor has not claimed emergency powers, nor has a "natural or man-made disaster of major proportions [occurred] within this state" jeopardizing "the safety and welfare of the inhabitants of this state." *See* §§ 44.010(3), 44.010(5), 44.100, RSMo 2000. No other statute or constitutional provision let DOSS or the Governor "suspend" this rule. Thus, neither DOSS nor the Governor had authority to suspend 13 CSR 70-10.150(1)B and the suspension is therefore void and illegal.

The expenditure of appropriated money is a ministerial duty which DOSS and DMS must perform. *See State ex rel. Vossbrink v. Carpenter*, 388 S.W.2d 823, 827-28 (Mo. banc 1965) (mandamus ordering expenditure of appropriated funds); *State of Missouri v. Heckler*, 579 F.Supp. 1452 (W.D. Mo. 1984). It is undisputed that the appropriation authority for the $20,795,140 in dispute remains valid today. *L.F. at 102, 122, 124*. Separation of Powers dictates that where the General Assembly specifically appropriates money intending for that money to be spent as mandated by a legal rule, the money must be spent consistent with the appropriation.

II. The trial court erred by concluding that the Respondents could lawfully refuse to disburse federal money that was set aside in the Title XIX Fund and appropriated by the General Assembly in § 11.445 of House Bill 11 (2001) for payments to increase the quality of health care provided to nursing home residents because:

A. The Governor's action was arbitrary, capricious, and unreasonable in that he did not determine the revenue estimate upon which the § 11.445 Title XIX Fund appropriation was based or the amount of actual revenue for the Title XIX Fund; and

B. Since federal money is held by the State in trust and cannot be used contrary to its federal purpose under article IV, § 15 of the Missouri Constitution, the Governor's power to reduce expenditures below appropriations under article IV, § 27 of the Missouri Constitution does not apply to the appropriation of federal money from the Title XIX Fund. The Governor's refusal to disburse was an unlawful impoundment and a violation of Separation of Powers (article II, § 1 of the Missouri Constitution).

The standard of review for this Point is the same as the standard recited for Point I.

The trial court did not consider the issues raised in this Point, because it found that article IV, § 27 is triggered for the "whole budget." Since that theory is wrong as a matter of law, this Court must also consider whether the Title XIX Fund withholdings were unlawful. Actual revenue for the Title XIX Fund was less than estimated.

L.F. at 100-01; *Tr. at Exh F 777*. The Governor, however, could not withhold the money appropriated for second enhanced payments by the §11.445 Title XIX Fund appropriation because (1) the Governor made no inquiry regarding actual and estimated revenue for the Title XIX Fund, and (2) the Title XIX Fund contains federal money which must be used for its federal purpose.

A. The Governor's action was arbitrary, capricious, and unreasonable in that he did not determine the revenue estimate upon which the § 11.445 Title XIX Fund appropriation was based or the amount of actual revenue for the Title XIX Fund.

Appellants brought this suit under § 536.150, which permits a court to review an administrative decision to determine whether it was "unreasonable, arbitrary, or capricious." § 536.150, RSMo 2000.

Respondents had the burden of showing that the withholding from the Title XIX Fund was legal. *Albright*, 64 S.W. at 108 (a person who relies on a Separation of Powers exception to justify his actions has the duty "to point out – to place his finger on – the very identical provision of the Constitution on which he relies to support his plea of justification; and, unless this can be done, he stands defenseless before the bar of the courts"). According to Mark Reading (who had responsibility for the withholdings), the Governor did not even consider what the revenue estimate and actual revenue were for the Title XIX Fund. *Tr. at 249-50*. This evidence was undisputed. Since the Governor did not even consider actual and estimated revenue for the Title XIX Fund, the Governor's actions were unreasonable, arbitrary, and capricious as a matter of law. *See*

Davis v. Dept. of Soc. Servs., 21 S.W.3d 140, 141 (Mo. App. 2000) (administrative decisions must be supported by substantial and competent evidence, and cannot be arbitrary or capricious).

The federal money for second enhanced payments was available until the Governor impounded and refused to expend it. As described above, impoundment of appropriated money is unconstitutional. *See Volpe*, 479 F.2d at 1107-09. The judgment of the trial court should be reversed and the case remanded, so the trial court can enter judgment on this Point for Appellants.

B. Since federal money is held by the State in trust and cannot be used contrary to its federal purpose under article IV, § 15 of the Missouri Constitution, the Governor's power to reduce expenditures below appropriations under article IV, § 27 of the Missouri Constitution does not apply to the appropriation of federal money from the Title XIX Fund. The Governor's refusal to disburse was an unlawful impoundment and a violation of Separation of Powers (article II, § 1 of the Missouri Constitution).

Money from the Title XIX Fund is federal money used as the federal matching component of first and second enhanced payments (among other federal Title XIX expenses). *L.F. at 97-98*; § 208.170.8, RSMo 2000. Article IV, § 15 of the Missouri Constitution specifies that the Treasurer must hold federal money in trust for its federal purpose:

> [O]nce deposited into the treasury, [federal] moneys retain their character as federal (as opposed to state) funds: "The

> investment and deposit of state, United States and nonstate funds shall be subject to such restrictions as may be prescribed by law." [Mo. Const. art. IV, § 15.] The idea that the state is more like a custodian of federal funds than their owner is entirely consistent with the constitutional provision [Mo. Const. art. III, § 38(a)] authorizing receipt of federal moneys.

Comm. for Educational Equality v. State, 967 S.W.2d 62, 64-65 (Mo. banc 1998); *see also Mallory v. Barrera*, 544 S.W.2d 556, 561 (Mo. banc 1976) (federal money is held in trust for its federal purpose). Thus, the Governor cannot use his article IV, § 27 power to redirect federal money contrary to its federal purpose. *Cf.* U.S. Const. art. VI (Supremacy Clause).

Moreover, the portion of article IV, § 15 requiring the state to hold federal money in trust was enacted in 1986. *Comm. for Education Equality*, 967 S.W.2d at 64-65. The Supreme Court has recognized that the 1986 amendment constitutionalized the *Mallory* holding: federal money is held in trust by the State. *Id*. To the extent article IV, § 15 and article IV, § 27 conflict or are inconsistent, the 1986 amendment to § 15 should control § 27, which was adopted in 1945 and never changed. *State ex rel. Bd. of Fund Commissioners v. Holman*, 296 S.W.2d 482, 491 (Mo. banc 1956).

Appellants filed suit on June 12, 2002. They noticed a hearing on their Motion for Temporary Restraining Order (TRO) and Order to Show Cause for June 13, 2002 at

10:00 a.m. *L.F. at 108*. Respondents objected under Rule 92.02(a)(3) requiring 24-hour notice, and the TRO hearing was rescheduled for Friday, June 21, 2002. *L.F. at 108*.

The day before the hearing, June 20, 2002, the State made a first enhanced payment to the non-state government owned nursing facilities. *L.F. at 104*. This payment was **in addition to** the four quarterly first enhanced payments provided for by the rule. *See L.F. at 104, 119*; *Tr. at Exh F 411* (first enhanced payments are made quarterly). The nursing homes transferred $20,700,000 to the local government entities. *L.F. at 104*. The local government entities than transferred $20,700,000 to DOSS, which deposited the money in the IGT Fund. *L.F. at 104*. This action – taken after the lawsuit was filed and the day before the rescheduled hearing on the Motion for Temporary Restraining Order and Order to Show Cause – netted the State $12,637,868 in federal matching money. *Tr. at Exh F 87*. The state law component of the payment – $8,062,132 – was also returned to the state. *Tr. at Exh F 87*.

In making the June 20 first enhanced payment, the State "hit" the federal upper payment limit for Medicaid payments to nursing homes. *Tr. at 99-100*. As a result, the federal government apparently will not provide any more matching money for SFY 2002. *Tr. at 100*.

Respondents refused to pay the $20,795,140 in second enhanced payments, even though payment was required by § 11.445, 13 CSR 70-10.150(1)(B)2, and SPA 00-08. If Respondents had made the payments as required, Appellants would have received state and federal share money to which they are entitled. Instead, Respondents drew down the federal money intended for second enhanced payments and recycled it as a first enhanced

payment on June 20, 2002. This Court should recognize that Respondent Treasurer Farmer held that federal money in trust to be paid as second enhanced payments to all Medicaid nursing facilities pursuant to 13 CSR 70-10.150 and SPA 00-08. *Committee for Educational Equality*, 967 S.W.2d at 64-65. By recycling that money to itself, Respondents used the money contrary to its federal purpose. When Respondent Farmer disbursed the Title XIX Fund money for use as an extra first enhanced payment, she violated article IV, § 15. This Court should order the Respondents to restore that money to the Title XIX Fund, so it may be paid out as a second enhanced payment. As explained above, the refusal to disburse this money to the nursing homes is an unlawful impoundment, and violates Separation of Powers.

For these reasons, the Court should declare that Respondent' refusal to disburse the remaining $20,795,140 of IGT Fund and Title XIX Fund money to Appellants is unlawful, reverse the trial court's judgment, and remand the case.

CONCLUSION

The actions of Respondents are unconstitutional and should be enjoined. This Court should reverse the judgment of the trial court, remand the case, and order the trial court to enter judgment for Appellants, requiring Respondents to disburse the $20,795,140 of unlawfully withheld money as appropriated by § 11.445.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned certifies:

1. That this Brief complies with Rule 84.06(g) of this Court; and That this Brief contains 20,749 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

2. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies and one copy on diskette of the foregoing were served by hand-delivery, facsimile transmission, certified mail or United States mail, postage prepaid, this 24th day of October, 2002, to:

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